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## I. THE APPEAL WAS NOT FROM A FINAL DECISION OF THE DISTRICT COURT.

This case was argued before the District Court upon a rule for judgment for want of a sufficient affidavit of defense (R. 11, 12). That Court in effect discharged the rule by holding that "The affidavit of defense is adjudged to be sufficient." (R. 14).

There was no other order of the District Court adverse to petitioner's predecessor, but the United States Attorney filed in the clerk's office a praecipe for judgment in favor of respondent and against petitioner (R. 14) and the clerk complied with that order (R. 14).

The only exception that was filed by the United States Attorney was to the action of the District Court in adjudging the affidavit of defense to be sufficient (R. 15).

It has been uniformly held that the Circuit Court of Appeals has appellate jurisdiction to review only final decisions in the class of cases to which the present one belongs. The provision of the Judicial Code in question reads as follows:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error filed decisions." U. S. C. A., Title 28, Sec. 225, Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 936.

An order discharging a rule for judgment for want of a sufficient affidavit of defense is not a final decision and hence is not appealable.

In SHUMAKER v. LIFE INSURANCE COMPANY, 159 Fed. 112, this question came before the Circuit Court of Appeals for the Third Circuit and the court there said at page 113:

"We cannot assent to the suggestion of counsel that section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684) (the conformity act) would justify the assumption by this tribunal of the jurisdiction which the Pennsylvania Act of April 18, 1874 (P. L. 64), imposed upon the Supreme Court of that state. That section refers in terms to Circuit and District Courts, and to the state within which such courts are held. It is inapplicable to a subsequently created appellate court for a circuit comprising several states. Moreover, it requires conformity with state law and practice only in whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding, and not even in such matters where Congress itself has legislated upon the subject and prescribed a rule. A question of jurisdiction is not within the categories mentioned; and upon the subject of reviewable judgments Congress, as we have seen, has legislated and prescribed the rule. Amy v. Watertown, 130 U. S. 305, 9 Sup. Ct. 530, 32 L. Ed. 946.

We may be permitted to add that this particular statute has not proved to be satisfactory to the courts of the state by which it was enacted, and were we at liberty to adopt it the experience of those courts would deter us from doing so. Radcliffe v. Herbst, 135 Pa. 574, 19 Atl. 1029, was an appeal to the Supreme Court of Pennsylvania from the refusal of the court below to enter judgment against the defendants for want of a sufficient affidavit of defense, and in deciding it the reviewing court said:

'The language of this court in Griffith v. Sitgreaves, 81 Pa. 378, is so applicable to the class of cases that I quote it here: "The act of assembly authorizing writs of error to be taken when a court of common pleas refuses to enter judgment on the ground of the sufficiency of an affidavit of defense

was intended to reach only clear cases of error in law, and thus to prevent the delay of a trial. Its effect is often to produce two writs of error in the same cause, instead of one, and is not to be encouraged.'' ''

The discharge of the rule for judgment leaves the case at issue, ready for trial, where all questions may be finally determined by judgment for plaintiff or defendant.

In Pennsylvania the discharge of a rule for judgment for want of a sufficient affidavit of defense is only appealable by reason of the special Act of Assembly referred to in the *Shumaker case, supra,* and is an exception to the general law that appeals may be taken only from final decisions. In the absence of similar Congressional legislation the jurisdiction of the Circuit Court of Appeals cannot be extended over such interlocutory orders as the discharge of a motion for a summary judgment.

A review of the assignments of error (R. 16, 17) clarifies our point.

The first nine Assignments of Error scarcely need the court's attention inasmuch as they are but quotations from the reasoning in Judge Kirkpatrick's opinion. They refer to no action taken by the court nor to any appealable error committed by the District Judge.

Assignment No. 10 is to the refusal of the Trial Judge to make absolute the rule for judgment. As set forth in the *Shumaker case, supra,* this is not an appealable error.

Assignment No. 11 is simply the converse of Assignment No. 10 and is answered in the same way.

Assignment No. 12 is to the discharge of the rule for judgment and also comes under the principle of the *Shumaker Case.*

Assignment No. 13 is to the Trial Judge's direction for the entry of judgment for the defendants. It is sufficient to say in answer to this assignment that no such

order was made by the Trial Judge. The judgment was voluntarily entered by the United States Attorney when the case was at issue upon Statement of Claim and Affidavit of Defense. There is no appeal from a judgment or decree entered voluntarily by the party appealing. UNITED STATES v. BARRETT, 104 U. S. 767, is directly in point and as the opinion of Mr. Chief Justice Waite is short we quote it in full.

> "The question presented to the court below on the trial of this case was, whether in the computation of longevity pay for an officer in the Army of the United States, under the provisions of the Act of 1878, ch. 263, sec. 7, 20 Stat. at L., 145, Sup. R. S., 362, his period of service as a cadet at West Point was to be taken into account. The court decided it was not, and an elaborate opinion to that effect was filed; but the record shows that after the decision was announced a *pro forma* judgment was rendered, with the consent of the Attorney General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal.
>
> In *R. R. Co. v. Ketchum*, 101 U. S. 289, we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion this case comes within that rule. The consent to the judgment below was in law, a waiver of the error now complained of."

See also DRAINAGE DIST v. R. R., 163 Fed. 836, 837, and HODGESON v. VROOM, 266 Fed. 267, 269.

Assignment No. 14 is to the Trial Judge's action in adjudging the affidavit of defense sufficient and Assignment No. 15 is the converse thereof. Both of these assign-

ments are likewise ruled by the principle announced in the *Shumaker Case*.

It is therefore submitted that if respondent has appealed from the discharge of the rule for judgment, as his exception would imply, the appeal is from an interlocutory decision.

If on the other hand it is from the judgment entered at the order of his own attorney when the case was at issue, it is a judgment by consent, which cannot be the foundation for an appeal.

If the court should be of the opinion that the appeal was properly taken and that there were any assignments of error which the Circuit Court of Appeals had jurisdiction to consider, the next obstacle to the present suit is:

II. THE PRESENT PETITIONER HAS NO STANDING IN THIS CASE BECAUSE OF TWO FAILURES TO COMPLY WITH THE ABATEMENT ACT.

The petitioner admits that "the former suit by McCaughn was properly abated since no substitution was made within six months after the expiration of his term as provided by statute". It follows that the present petitioner is not properly a party to this case.

MacLaughlin was the original plaintiff in the present case. He died in June 1933 and in July 1933 a suggestion of his death was filed. Thereafter the United States Attorney proceeded in the name of Ladner, the next collector, although it was never shown to the court that there was need of continuing the action, nor was any permission for the substitution obtained from the court.

On October 16, 1933, after the certiorari had been granted, a suggestion of the resignation of Ladner and the substitution of Fix was filed in this court.

Respondent was not notified of the presentation of either of these suggestions nor was it given opportunity

to present an objection. The District Court did not even pass upon the first substitution. Both of the attempted substitutions therefore offend section 11 (c) of the Act of Feb. 13, 1925, c. 229, 43 Stat. 936, which prescribes the only terms upon which the substitution may be made.

> "(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

This clause expressly states the condition precedent to substitution. The petitioner has failed to comply with the Act which is the only authority for the substitution. The suggestions therefore have no legal effect and there is no person legally competent to appear as the party plaintiff in this suit.

The terms of the Act of 1925 have been carried into the rules of this court as Rule 19, sec. 4:

> "4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

The petitioner attempts to explain his failure to comply with the Act and the rule of this court, in the footnote on page 4 of his brief, by saying that the United States Attorney at Philadelphia advises that the substitution of Ladner by a simple suggestion and without notice

to the opposing party or permission of the court, is in accordance with the Pennsylvania State practice.

The petitioner is evidently relying upon the conformity act to sustain the contention that this method of substitution is sufficient and that he may follow the state practice rather than the procedure required by the Act of Congress.

This argument has been ruled upon to the contrary so many times that it is not open to question.

As stated by Mr. Justice Gray in SOUTHERN PACIFIC R. R. v. DENTON, 146 U. S. 202, 209 (1892):

> "And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter."

In LUXTON v. BRIDGE CO., 147 U. S. 337, 338 (1892), the same Justice said:

> "This direction that the proceedings in the Circuit Court of the United States shall 'conform as nearly as may be to the practice in the courts of the State' must, of course, like the corresponding direction as to practice, pleadings and procedure in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress."

See also INDIANAPOLIS & ST. L. R. R. v. HORST, 93 U. S. 291; CHATEAUGAY CO., petitioner, 128 U. S. 544; EX PARTE FISK, 113 U. S. 713, 721; WHITFORD v. CLARK COUNTY, 119 U. S. 522.

But even if the State practice were permissible, we find that the statement of the United States Attorney is

erroneous, for the Pennsylvania Act and the Act of Congress are practically identical.

The Act of the Legislature, April 4, 1919, Pamphlet Laws 35, sec. 1, provides as follows:

> "Be it enacted, &c., That no suit, action, or other proceeding, at law or in equity, lawfully commenced heretofore, now pending, or which may hereafter be commenced, by or against the head of any department or bureau, or other officer, of the Commonwealth of Pennsylvania, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office, but in such event the court, on motion or supplemental petition, filed at any time within twelve months, thereafter, showing a necessity for the survival thereof, may allow the same to be maintained by or against his successor in office. And the court may make such order as shall be equitable for the payment of costs."

No doubt the United States Attorney was referring to the practice in Pennsylvania in suits between private citizens. In such cases the procedure is governed by the Act of June 7, 1917, Pamphlet Laws 447, sec. 35 (a) as amended by the Act of March 30, 1921, P. L. 55, sec. 1, which permits the substitution of the personal representative of a deceased party without the requirement of notice to the other party or permission of the court. This act is the same in all essentials as the Act of Congress governing the substitution of private parties to suits in the Federal Courts. (Rev. Stat. sec. 955; Nov. 23, 1921 c. 142 secs. 1, 2, 42 Stat. 323, 324; (U. S. C. A. sec. 778).)

Thus it is unnecessary to inquire into the Pennsylvania practice or the Conformity Act. The question is whether the Act of Congress of 1921 governing suits between private parties, or the Act of 1925 which expressly legislates concerning suits by public officials, controls the procedure to be followed. There can be only one answer. The particular legislation referring to suits by officers takes precedence over the general legislation and is exclusive in the field which it covers.

The truth of this conclusion is confirmed when it is considered that the Act of 1921 and the Pennsylvania Act for substitution of private parties, provide only for the substitution of the personal representative of the deceased party. It was not the personal representative who was substituted in this case, but the successor in office. There is no authority of any kind for his substitution except the Act of 1925 and hence the requirements of that Act must be followed before the case can proceed.

## III. THE ABATEMENT OF THE PRIOR ACTION ABATED ALSO THE CAUSE OF ACTION.

The petitioner has correctly given the history of the legislation contained in the Acts of 1899 and 1925. The Act of 1899 was inspired by this Court's opinion in U. S. EX REL. BERNARDIN v. BUTTERWORTH, 169 U. S. 600, wherein it was pointed out that legislation should be passed to permit an action of mandamus to be continued against the successor in office, when he persisted in the allegedly illegal conduct of his predecessor. It is also true that the discussion in the House upon the bill was centered around this phase of the problem.

The petitioner argues from this that the sole purpose of the Abatement Act was to permit the continuance of mandamus and habeas corpus proceedings, which by their nature must be suits *against* public officials.

The Act in its title as well as its body legislates concerning actions *by* as well as *against* officers of the United States. Thus, while the opinion in the *Butterworth Case* was probably what brought before Congress the need of remedial legislation, we cannot say that Congress intended to, or did, limit the necessity for prompt substitution to actions of mandamus and habeas corpus. The Act itself prevents such conclusion by referring to actions *by* officers, actions which could not be in the nature of mandamus or habeas corpus, but must, of necessity, be for the enforcement of some such right of action as is alleged in the present case.

The petitioner also argues that the Abatement Act is merely permissive legislation and not mandatory, citing EX PARTE PRADE, 289 U. S. 444, and BROWN-CRUMMER CO. v. CITY OF FLORALA, 55 Fed. (2nd) 238. The former case arose by reason of a bill to enjoin the threatened enforcement by a state officer of an unconstitutional statute. Upon his retirement from office the plaintiff sought to substitute his successor and this court held that the substitution was not proper, at least without a showing that there had been some threat by the successor to continue the illegal conduct. The Abatement Act was therefore held not applicable. In the course of the opinion Mr. Justice Butler said that the act was permissive in that it did not require, but merely authorized the court to substitute. From this point of view the act is permissive. But that is far from saying that the cause could be continued *without* a proper substitution. The granting of permission to substitute is discretionary (probably within certain limits), but a substitution there must be, if the cause is not to abate. It was so held in U. S. v. CURRAN, 276 U. S. 590 in which the per curiam opinion was,

> "It appearing that Henry H. Curran, sued herein as Commissioner of Immigration, resigned such office on March 31, 1926, and was succeeded by Benjamin M.

Day, who now holds that office, and that no motion was made under par. 11 of the act of February 13, 1925 (c. 229, 43 Stat. 936, 941), 'asking the Court to 'permit the cause to be continued and maintained by or against the successor in office of such officer,' and, that the six months' period, within which such a motion could have been made, has expired, the Court now vacates the judgments entered in the District Court and in the Circuit Court of Appeals and remands the cause to the District Court with a direction to dismiss the cause as abated.''

And in LE CRONE v. McADOO, 253 U. S. 217, 219, this Court speaking by Mr. Justice Holmes reached a similar conclusion.

> "But we cannot consider that question or the other arguments upon the merits of the case, because, Mr. McAdoo having resigned the office of Secretary of the Treasury, his successor was not substituted within twelve months; which is the limit for such substitution fixed by the Act of February 8, 1899, c. 121, 30 Stat. 822."

For the purpose of this case the Act is clearly mandatory. Indeed petitioner's admission that the first suit was properly abated, necessarily includes an admission that the act is mandatory. For otherwise the first suit should not have been stricken off for failure of the plaintiff's successor to comply.

The petitioner has referred to BOWERS v. AMERICAN SURETY CO., 30 Fed. (2nd) 244 as holding that bonds of the nature of that in suit are obligations running in favor of the collectors as they succeed each other. This was a suit by Bowers, collector, upon a bond given to his predecessor. No prior suit had been brought. Judge Hand in his opinion recognizes that the right of a succes-

sor in office to sue upon a specialty given to his predecessor is doubtful. He then cites the Abatement Act and reasons that if Congress thereby permitted the successor to be substituted upon the death of the original obligee *pendente lite*, Congress must have intended that the successor could bring the suit if one had not been commenced during the term of the obligee.

The right of the successor to sue was therefore held to have arisen by implication from the Act of 1925 and the Act of 1899 which it modified, and without that legislation it seems most doubtful that by the common law, the successor could have sued upon the specialty. If these Acts are the basis of the right to sue, it follows that there is no right unless the Act is complied with. Upon failure to comply the right to sue is lost. For, if the right of the successor arises only from the Act, that right cannot survive independently of the Act. And if the permission to sue is confined by a definite mode of procedure, the right to sue without compliance cannot be presumed.

The petitioner has cited the following cases for the proposition that the abatement of this suit does not defeat the cause of action. They shed little light upon the question before the court.

MARTIN v. BALT. and OHIO R. R., 151 U. S. 673, was a case, decided under the Statutes of West Virginia, which provided that an action for personal injuries abates upon the death of the parties. It was held the cause of action abated upon death.

MACKER v. THOMAS, 7 Wheat. 529 and GREEN v. WATKINS, 6 Wheat. 260 were real actions (writs of right) and it was held that the writs abated upon the death of a party, that the heir could not be substituted, but that a new action must be brought. The reason is that a new cause of action arises in the heir. As stated by Mr. Justice Story in the latter case,

"All personal actions by the common law abate; and

it required the aid of some statute, like that of the thirty-first section of the judiciary act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as it was in the life-time of the party."

ELLIOTT v. TEAL, Fed. Cas. No. 4389 was decided under the laws of Oregon and the original suit was held not abated by a transfer of title to the real estate involved. No question was raised in this case as to a new suit, for the first was not abated.

WARREN v. FURSTENHEIM, 35 Fed. 691 was a motion to revive—that is, to continue—an action for personal injuries after the death of the defendant. It was held that the Statutes of Tennessee saved such suits from abatement if suit had been brought before death, and the action was not abated. This decision does not touch upon the right to bring a new suit after the first has been abated for failure to comply with the act which permitted the substitution.

In HARRISON v. FIRE INS. CO., 102 Iowa 112, a suit had been prematurely brought and upon a plea in abatement a verdict was directed for the defendant. A Statute of Iowa permitted a new suit which we submit the common law also would allow. The same may be said of ST. ROMES v. COTTON PRESS CO., 127 U. S. 614 in which the first case was dismissed for want of proper parties. These cases are no authority for the present case in which the original action was properly brought and where the controversy could have been concluded but for the defendant's failure to keep it alive.

PITTS v. BANK, 121 Ill. 582, was a question of formal common law pleading. It was held that the plea that the note in suit was not due was not in proper form for a plea in abatement and therefore judgment was entered for plaintiff. No question was raised in that case about the survival of actions and we cannot conceive the purpose for which it was cited.

This court has never decided whether the abatement caused by the failure to substitute as provided by the Act of 1925 abates the cause of action or only the particular action. The only decision upon this question that we have found is KUTTROFF v. SUTHERLAND, 49 Fed. (2nd) 944, D. C. N. Y. in which it was held:

> "The defendant Frank White resigned as Treasurer of the United States on April 30, 1928. No application has ever been made for the substitution of any of his successors, and, it being more than six months since he resigned, the suit against the Treasurer of the United States has abated and cannot be revived against the present Treasurer." (Citing the Act of 1925.)

The petitioner has argued that the new suit may be brought because the cause of action, being ex contractu, survives the death of the obligee. Of course, the Act of 1925 would not have the effect of continuing causes of action which abated by death. It is concerned only with those causes of action which do survive and provides the method to be followed in order to accomplish this purpose. If it be admitted that the cause of action upon this bond survived the death of the obligee, it is still true that prior to the Act of 1899 there was no method for its enforcement by suit. The personal representative could not have sued and there was no authority known to the common law whereby the successor in office could have brought the ac-

tion. It must follow that the suit upon the bond must comply with the terms of the Act which permits what the common law denied.

The Supreme Court of Vermont has so held in BENSON v. CRAIN, 91 Vt. 44, 99 Atl. 255 in an opinion by Mr. Justice Taylor,

> "It is unnecessary for the purposes of this inquiry to consider what becomes of plaintiff's *cause of action* against the deceased defendant. The question for decision relates to the survival, or perhaps, more accurately speaking, to the revivability, of a suit that would abate at common law. Inasmuch as the revival of an action at law is purely statutory in its origin, the mode provided by statute is exclusive; that is to say, it is revivable only in the manner and to the extent provided by the statute."

The petitioner argues that Congress could not have intended that the cause of action abate with the abatement of the first suit. But if the right of action normally survives the death, and if it passes to the successor, why should Congress have limited the time of substitution? If it was to be permissible for the successor to bring a new action upon the abatement of the former one, why should Congress place a time limitation upon the right to substitute in the first suit? It is as useless to harass the plaintiff by providing for the abatement of his suits from time to time, without affecting his cause of action, as it is to require the defendant to defend many suits upon the same cause of action, when such a simple procedure is offered for the continuance of the original action to a conclusion.

The petitioner has cited the two *Claussen* cases and the two *Cunningham* cases at page 15 of his brief for the proposition that the abatement of the first suit for failure to substitute does not prevent a new action. The second suit in each of these cases was predicated upon the new and

independent action of the succeeding defendant officer, and the cause of action which was the basis of the second proceeding was not in existence at the time of the first suit. It is apparent that the relator in those cases might bring his second suit for his new cause of action. Therein those cases differ in principle from the present one, in which the cause of action, the bond in suit, was the same in both cases. But it has always been held that actions of mandamus and habeas corpus against officials were personal actions against them and were not directed against the office which they held.

Petitioner has also argued that the holding of the courts below imposes a time limitation upon the enforcement of bonds to insure payment of taxes and that Congress could not have so intended. If the decision in *Bowers v. American Surety Co., supra, is correct,* there is no limitation upon the time within which the first suit may be brought. When Congress has placed a two year statute of limitation upon the tax itself, it is entirely comprehensible that it should prescribe an orderly procedure by the correct party to collect the revenue represented by the bond, and abate the cause for refusal to follow the simple method which was required, within a time limit which is ample.

## CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

WALTER BIDDLE SAUL,
THOMAS P. MIKELL.